Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOHN M. OGLESBY and LOIS P. OGLESBY,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the provisions of the Locomotive Boiler Inspection Act (LBIA) and the Federal Railroad Safety Act (FRSA) apply to manufacturers?

2. Do the provisions of the LBIA and the FRSA pre-empt State common law claims based upon a manufacturer's failure to warn or instruct?

PARTIES TO THE PROCEEDING

Petitioner's claim against the Delaware and Hudson Railway Company was dismissed with prejudice after the action against the railroad was disposed of through bankruptcy proceedings.

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Appendix A – Opinion of the United States Court of Appeals for the Second Circuit Decided June 17, 1999 ..... 1a

Appendix B – Memorandum-Decision and Order of the United States District Court For the Northern District of New York at Albany dated February 10, 1997 ..... 9a

Petitioners, John M. Oglesby and Lois P. Oglesby respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion dated June 17, 1999 of the United States Court of Appeals for the Second Circuit is reported at Oglesby v. Delaware & Hudson Railway Company, ___ F.3d ___ (2nd Cir. 1999)(Appendix A). The District Court decision dated February 10, 1997 is reported as Oglesby v. Delaware & Hudson Ry. Co., 964 F. Supp. 57 (N.D.N Y 1997)(Appendix B).

STATEMENT OF JURISDICTION

The decision of the Second Circuit Court of Appeals is dated June 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Locomotive Boiler and Inspection Act ("LBIA"), 49 U.S.C. §§20701-20903 states in pertinent part:

Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;
(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
(3) can withstand every test prescribed by the Secretary under this chapter.

The Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §20106 (1994) states in pertinent part:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

STATEMENT OF THE CASE

On August 13, 1986 petitioner John M. Oglesby, a trainman employed by the Delaware & Hudson Railway Company ("D & H"), severely injured his lower back while attempting to adjust the position of the engineer's seat on Boston & Maine Engine No. 351. The seat in question was designed by respondent General Motors Corporation ("General Motors") and manufactured by Coach and Car Equipment Company ("Coach").

The engineer's seat was connected by a pin to a pedestal base. The pedestal base was attached to a track on the side of the locomotive engine cab wall. The seat and its pedestal base could be horizontally adjusted to allow the engineer access to various portions of the engine. The seat could also be separated from its pedestal base after removing the connecting pin and using a lifting action. General Motor's own expert testified before trial that friction in the seat track that was an inherent part of the seat assembly design could require a user to jiggle the seat while supporting half of the seat's weight in order to overcome inertia and move the seat freely.

The seat petitioner attempted to move at the time of his accident was positioned at the extreme front end of the wall-mounted track. Mr. Oglesby attempted to move the seat backward by first disengaging the seat locking assembly, but was unable to move the seat backward in the track. On his second attempt to pull the seat backward, Mr. Oglesby was injured when the seat suddenly moved in the track. Mr. Oglesby did not remove the seat from its pedestal base prior to these attempts and, therefore, was bearing the weight not only of the pedestal base (11 pounds), but also half of the

seat's 62 pound weight. Petitioner had been previously informed that the seat could be detached from its pedestal base, but was never instructed or warned that the seat was to be removed from its pedestal base merely to change the position of the seat.

As a result of the aforementioned injuries, petitioners John M. Oglesby and Lois P. Oglesby commenced suit in the U.S. District Court for the Northern District of New York pursuant to the Federal Employer's Liability Act (45 U.S.C. §§ 51 -60) against the Delaware & Hudson. That claim was disposed of through bankruptcy court proceedings following the railroad's bankruptcy filing. In addition, petitioners commenced this action against respondent General Motors, claiming that General Motors was liable for Mr. Oglesby's injuries under strict product liability (manufacturing and design defect), negligence (prima facie tort) and breach of warranty theories. Mrs. Oglesby also asserted a derivative claim against General Motors for loss of her husband's services and consortium.

On or about March 15, 1994 General Motors moved the District Court for an order granting respondent summary judgment, or in the alternative, precluding the testimony of petitioners' civil engineering expert, Harlan W. Fair. This motion was granted on July 18, 1994 to the extent that all of petitioners' claims relating to a defect in design were dismissed after petitioners' expert, Harlan W. Fair, was found by the Court to be disqualified regarding those claims. Oglesby v. General Motors Co., No. 86-CV-1133 (July 18, 1994 N.D.N.Y.). Without Harlan W. Fair's testimony, the Court found no substantive evidence to support petitioners' design defect claim, and the Court granted summary judgment to General Motors on all claims except failure to warn.

On October 31, 1994, respondent once again moved the Court for summary judgment. In this motion, General Motors requested that the Court dismiss petitioners' only remaining claim, failure to warn. In a January 23, 1995 Memorandum Decision and Order, the Court denied respondent's motion and granted petitioners' counter-motion for a limited reopening of discovery to allow petitioners to obtain a new expert and provide expert disclosure. Oglesby v. General Motors Co., No. 86-CV-1133 (January 23, 1995 N.D.N.Y.).

Following issuance of the Order reopening discovery, petitioners retained a new expert witness to review the evidence and render a report. Dr. James Pugh, P.E. completed his study, evaluation and analysis of the relevant evidence in this action and rendered a report.

On January 19, 1996 General Motors submitted another motion for summary judgment with regard to petitioners' remaining claim for failure to warn on grounds of pre-emption. The Court issued a Memorandum-Decision and Order dated February 10, 1997 which: denied summary judgment; denied petitioners' counter-motion to reinstate the previously dismissed claims; and, granted petitioners' request to amend their answers to respondent's interrogatories to assert a failure to warn claim sounding in strict liability.

General Motors moved for reconsideration of the Court's February 10, 1997 Memorandum-Decision and Order. The Court denied respondent's motion for reconsideration.

Respondent, pursuant to 28 U.S.C. § 1292(b), appealed to the United States Court of Appeals for the Second Circuit, seeking reversal of the District Court's

decision to deny summary judgment on the claims premised upon a negligent and strict liability failure to warn. By decision dated June 17, 1999, the Second Circuit reversed the District Court's denial of summary judgment and remanded with instructions to grant General Motor's motion for summary judgment.

By Judgment dated July 16, 1999, the District Court: vacated its February 10, 1997 decision denying General Motor's motion for summary judgment; granted General Motor's motion for summary judgment in its entirety; dismissed petitioners' complaint with prejudice; and, entered judgment in favor of General Motors on all causes of action asserted against General Motors in petitioners' complaint.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IMPROPERLY EXPANDS THE DEFINITION OF A RAILROAD CARRIER TO INCLUDE MANUFACTURERS WHEN THE LBIA AND THE FRSA WERE INTENDED BY CONGRESS TO ONLY APPLY TO INTERSTATE RAIL CARRIERS.

Neither the Locomotive Boiler Inspection Act (LBIA) nor the Federal Railroad Safety Act (FRSA) pre-empt petitioners' failure to warn claims because the LBIA does not apply to manufacturers. Manufacturers are not "railroad carriers" as defined in the LBIA. Similarly, the FRSA does not apply to manufacturers. The statute addresses itself to railroad operations. Manufacturing railroad parts is not the functional equivalent of railroad operations. Respondent is not included within the pre-emptive scope of the FRSA.

The Second Circuit's decision in this matter was based, in part, upon a Ninth Circuit case, Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997). In Law, eight railroad workers claimed that their hearing was severely damaged by excessive noise from locomotive brakes and engines. The workers' claims were against the manufacturers of the brakes and engines—the same engine manufacturer/respondent, in fact, as in the case at bar.

The Law Court held that the LBIA applied equally to railroad carriers and railroad equipment manufacturers. The Court refused to give strict interpretation of the LBIA phraseology. "Railroad carriers," the Ninth Circuit found,

was meant to include railroad equipment manufacturers. The Law Court held this despite the reference to "its railroad line" later in the sentence, which clearly refers to the railroad carrier.

The Second Circuit's decision in this matter was also based, in part, upon the Sixth Circuit's decision in Springston v. Consolidated Rail Corporation, 130 F.3d 241, 244 (1997). The Springston case stemmed from a railroad grade crossing accident and involved claims brought by an injured driver of a truck against Consolidated Rail Corporation, the owner of the train and track and General Motors, which manufactured the train. The district court granted summary judgment to the defendants on plaintiff's claims of negligence based upon the lack of visual devices on the locomotive, finding the LBIA pre-empted the claims. The Sixth Circuit's decision focused upon whether the state law claims were pre-empted by the LBIA and not whether the LBIA applied to a manufacturer. Thus, Springston offers no guidance on the issue of whether a locomotive manufacturer constitutes a railroad carrier within the context of pre-emption under the LBIA.

Historically, the LBIA applied "to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad."(36 Stat. 913, Feb. 17, 1911) The term "common carrier" was again considered by Congress and was amended only to add that it meant:

> a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a

general railroad system of transportation.(43 Stat. 659, June 7, 1924)

While pre-emption analysis should focus "not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement" Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 561 n.3 (9th Cir. 1995), it cannot be said that the explicit wording of the statute should be ignored. This statute was revised in 1994 and if Congress had seen fit to change the statute to include manufacturers it could have done so. Instead, Congress left the wording as it has been since 1911 when it was originally drafted- - referring only to railroad carriers, which General Motors is not.

A complete analysis should also include a reading of the definition section of Part A- Safety, the part under which the LBIA falls. For purposes of this part, **"railroad carrier" means a person providing railroad transportation**. (49 U.S.C. § 20102.) (emphasis added) Certainly, General Motors does not argue that merely by manufacturing locomotives and their component parts they thereby provide railroad transportation. Manufacturers are simply not included in the scope of the LBIA.

General Motors has also argued, and the Ninth Circuit agreed, that the FELA supplies sufficient recourse for railroad workers injured on the job. However, the FELA only allows recovery against the employer. Where, as here, the manufacturer is the only entity keenly aware of the operation of a particular product and where the product complies with federal standards, any injuries, which arise from that product, are best compensated by the manufacturer. A jury could find that the railroad operator was not responsible for the injury so long as the seat assembly involved here complied with federal standards. Yet the same

jury could find that General Motors should have provided an instructional warning and that it was negligent not to do so.

The Ninth Circuit also noted the "realities of the business world" as sufficient to "deter manufacturers from designing substandard railroad equipment." Law, at 912. The Court relied on the liability of railroad employers to filter out substandard equipment. The argument goes like this: if a manufacturer produces faulty goods and a worker is injured by the goods, the railroad carrier will no longer purchase those goods and this will coerce the manufacturer to change its design of the goods so that they will again be purchased by the railroad carrier, but in a form that will not injure anyone. The Court additionally referenced the $20,000 per day fine for violations of the LBIA, which may be levied on railroad operators as further pressure on manufacturers to produce safe goods. This still does not provide an adequate legal remedy for the invasion of a legal right. There would be no remedy for those injured in the interim period between the first injury and the time when the manufacturer's products were taken off the railroad lines by the carriers.

Instructional warnings are typically included by manufacturers in paperwork that accompanies a product when it is placed in the stream of commerce. The warning or instruction of the sort which could have prevented petitioners' injuries is not a "part or appurtenance" as defined under the LBIA.

General Motors has argued that manufacturers are included under the pre-emptive umbrella of both the LBIA and the FRSA because of the notes following 49 U.S.C. § 21302. Those notes state:

> In subsection (a)(1), the words "(including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor)" are omitted as surplus because of the definition of "person" in 1:1 and because the provision being violated indicates to whom it applies.

As these notes state, the source for determining to whom a given provision applies is the provision itself. These notes merely recognize that different provisions relate to different entities and all may be referred to as "person".

Finally, the Second Circuit stated in its decision below, that:

> Where, as here, the design and construction of a part are in the hands of a manufacturer, the results that Congress had hoped to obtain through the BIA would be accomplished best by including the manufacturer within the statute's coverage.

To include manufacturers within the pre-emptive scope of the LBIA would contradict the intent of Congress to "promote the safety of employees and travelers upon railroads"(LBIA 1911) since to do so could leave injured parties without an adequate remedy under law for an injury.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW INCORRECTLY CONCLUDED THAT STATE COMMON LAW CLAIMS BASED UPON FAILURE TO WARN OR INSTRUCT ARE PRE-EMPTED BY THE LBIA AND THE FRSA.

The foundation for federal pre-emption of any state law or regulation is in the Supremacy Clause of the United States Constitution. Article VI, cl. 2 states the laws of the United States "shall be the supreme Law of the Land; . . .any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." There is, however, an "assumption that the historic police powers of the States [are] not to be superseded by . . .Federal Act unless that [is] the clear and manifest purpose of Congress."Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congressional purpose is the "ultimate touchstone of pre-emption analysis."Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)(*citing* Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

There are three circumstances when state law is pre-empted by federal law:

1) where Congress explicitly defines the extent to which its enactments pre-empt state law (express pre-emption);

2) where state law regulates conduct in a field that Congress intended the federal government to exclusively occupy (field pre-emption); and

3) where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (conflict pre-emption). Southern Pacific Transportation Co. v. Public Utility Comm. Of Oregon, 9 F.3d 807 (9th Cir. 1993)(*citing* English v. General Electric Co., 496 U.S. 72, 78-80 (1990)).

Given the presumption in favor of permitting state laws to stand, if the state law does not fit within one of the above three designations, federal pre-emption does not apply. In the case at bar, neither the LBIA nor the FRSA pre-empt petitioners' common law failure to warn claim or petitioners' strict liability failure to warn claim.

The Law Court found that claims for failure to warn were included within the purview of the LBIA field of pre-emption. The Court relied upon other provisions in the Federal Register, which required various warnings as support for its ruling that appellant's proposed warnings were pre-empted. Appellants there were claiming that there should have been some warning regarding the excessive noise which invaded the locomotive cab.

None of the warnings discussed in Law, whether in the Federal Register or the sort which appellants advocated, were intended to instruct a worker how to properly use a part or appurtenance of the locomotive. The warnings there were all meant to inform as to the status of a particular part. Again, the LBIA is not implicated here because the warnings and instructions of the sort which could have avoided petitioner's injury would not be a "part or appurtenance," but

even if it were, Law is distinguishable in that it dealt with a different, non-instructional, type of warning.

The LBIA, in relevant part, requires railroads to operate a train only when "its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate . . ." and "without unnecessary peril to life or limb."49 U.S.C. §20701 (1994). "It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." Napier v. Atlantic Coast Line R.R. Co. et al., 272 U.S. 605 (1926)). In Napier, the Supreme Court decided that the LBIA was intended to "occupy the field" and that state legislation requiring cab curtains and automatic firebox doors was pre-empted.

At issue here is not state legislation, but a more general common law liability for a failure to warn or instruct. Cases since Napier have further discussed the scope of the field pre-empted by the LBIA. "The scope of pre-emption under the Boiler Inspection Act is determined by the interpretation of the words 'parts and appurtenances.'"Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983).

> Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability." Southern Railway Co. v. Lunsford, 297 U.S. 398, 402 (1936).

The failure by General Motors to provide Mr. Oglesby with instruction and warning regarding the use of the locomotive seat in question indeed led to petitioner's on-the-job injury, but it is not the sort of "part or appurtenance" included under the wording of the LBIA. The warning or instruction in question would not be an "integral or essential part of a completed locomotive" nor is it a part or attachment "definitely prescribed by lawful order." *See* Southern Railway, *supra*.

Respondent claims that because there is mention of the engineer's seat in the regulations promulgated under the LBIA, all aspects of cab seat design are thereby dealt with. 49 C.F.R. § 229.121(a) requires that a cab seat shall be "securely mounted and braced," nothing more. As the District Court below stated in its decision denying General Motor's motion for summary judgment, "it is not difficult to imagine a cab seat that is sufficiently secured and braced, yet is woefully defective in design and can cause serious injury to a user." For that matter, it is not difficult to imagine many products that, although non-defective, are dangerous and require warnings and instructions for safe use. Again, it must be remembered that petitioners are not disputing the design of the seat in their failure to warn claims, but instead are claiming a failure to make Mr. Oglesby aware of the particular procedures required to safely move the seat in question.

The FRSA was enacted in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. §20101 (1994). Contrary to the LBIA, pre-emption analysis under the FRSA is explicitly stated. Pursuant to 45 U.S.C. §20106 (1994),

> A State may adopt or continue in force any law, rule, regulation, order, or standard

> relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.
>
> To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.[. . .]The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses. CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993).

General Motors has shown nothing more than a brush with a regulation mentioned. The federal regulations cited by respondent certainly do not "substantially subsume the subject matter" of the state failure to warn common law. The mere requirement that a locomotive engineer seat be securely mounted and braced does not "substantially subsume" the

concept of negligent failure to warn or strict liability for failure to warn.

In both cases previously cited by General Motors in support of its FRSA defense, the restrictions in question were dealt with in a detailed fashion by federal regulation. In CSX the issue was excessive train speed and in Ouellette v. Union Tank Car Co., 902 F.Supp. 57 (N.D.N.Y. 1997) the issue was exterior handrails. In CSX the Secretary of Transportation had enacted numerous regulations relating to several aspects of grade crossing safety, including excessive speed. Different regulations were promulgated for different classes of track and particular warning devices were required depending on the type of crossing. Where a subject is addressed in such great detail, there is little doubt that states have no room to enforce additional regulations.

In Oulette the Court was required to assess a claim for faulty handrails. The subject of handrails is dealt with at length in the Code of Federal Regulations. (*See* 49 CFR § 231.7) The Secretary has addressed the number, dimensions and locations of handholds. This is surely different from the case at bar where the only regulation pertaining to cab seats says that they must be securely mounted and braced.

It should also be noted that the analogy drawn by the District Court in Oulette is faulty. The Court there compared the FRSA to the Medical Device Act (MDA). The Oulette Court applied the FRSA to a manufacturer, as, the Court said, one would the MDA. General Motors, therefore emphasized the applicability of the FRSA to manufacturers. There is, however, a fundamental difference in the focus of the statutes. The MDA is addressed specifically to manufacturers. It is intended to regulate the way in which a medical device or product comes into the hands of a consumer. On the contrary, the FRSA is intended to

"promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." Similar to the LBIA, this Act addresses itself to railroad *operations*.(emphasis added). A manufacturer is not involved in railroad operations. Manufacturers sell products which a railroad carrier may then utilize in operations on the railroad. Thus, the comparison drawn by the Oullette Court between the MDA and the FRSA is flawed, and the FRSA does not pre-empt Petitioners' claims for failure to warn.

The Second Circuit decision herein cited: Gilbert v. Burlington Indus., 765 F.2d 320, 327-328 to establish that ERISA occupies the field of employee benefit plans; and, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) for the proposition that ERISA "pre-empts state claims, whether raised under state statutes or at common law." In Alessi, the Supreme Court had to decide whether offset provisions in private pension plans, which reduced a retiree's pension benefits by the amount of workers' compensation awards received subsequent to retirement, were lawful under ERISA. In reaching its decision, the Court stated at page 523 that: "Whatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits - integration - that is permitted by federal law."

The Supreme Court's decision in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) is most relevant. The issue before the Court in Medtronic was whether the Medical Device Act pre-empted the Lohrs' common law claims based upon negligent design, manufacturing and labeling. The court stated in part:

> State requirements of general applicability are pre-empted only where they have 'the

effect of establishing a substantive requirement for a specific device.' Medtronic at page 500.

The federal manufacturing and labeling requirements at issue reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation which the statute or regulations were designed to protect from potentially contradictory state requirements. Medtronic at page 501. (emphasis added)

Similarly, the predicate for the failure to warn claim is the general duty to inform users and purchasers of potentially dangerous items of the risks involved in their use. These general obligations are no more a threat to federal requirements than would be a state-law duty to comply with local fire prevention regulations and zoning codes, or to use due care in the training and supervision of a work-force. These state requirements therefore escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that §360k envisioned to be 'with respect to' specific devices such as pacemakers. As a result, none of the Lohrs' claims based on allegedly defective manufacturing or labeling are pre-empted

> **by the MDA.** Medtronic at pages 501-502. (emphasis added)

There is no rational basis for pre-emption of petitioners' failure to warn/instruct claims against General Motors. Exempting petitioners' failure to warn/instruct claims from federal pre-emption would not undermine or "impede the ability of federal regulators to implement and enforce specific federal requirements" governing the interstate railroad industry in general, or the specific design of locomotive engineer seats in particular. The need for a manufacturer to provide warnings and instructions regarding how to safely use a product does not touch upon standards of design. Warnings and instructions regarding the proper use of a locomotive engineer's seat can be provided in accompanying paperwork that is not a part or appurtenance of the locomotive. The Second Circuit decision in this matter stated that:

> Appellees contend that GM's alleged failure to provide an instructional label on its cab seat does not fall within these broad parameters and hence is not pre-empted. This argument begins from an incorrect premise: the relevant inquiry is not whether a label falls under the BIA but whether a cab seat does. That such a seat is within the scope of the BIA is obvious. Indeed, the Secretary of Transportation has issued a regulation dealing with cab seats. See 49 C.F.R. § 220.110(a).

Respectfully, the Second Circuit focused on the wrong issue. The issue is not whether a locomotive engineer's seat is within the scope of the LBIA or FRSA, but rather, whether a duty to warn or instruct how to use a potentially dangerous

product constitutes regulation of the product. As the Supreme Court noted in the Medtronic case, "State requirements of general applicability are pre-empted only where they have 'the effect of establishing a substantive requirement for a specific device.'" Petitioners' failure to warn/instruct claim does not have "the effect of establishing a substantive requirement for a specific device" and should not be pre-empted by federal law.

CONCLUSION

The Circuit Court decisions relevant to the issues raised by this petition were based upon erroneous interpretations of congressional intent and excessive application of federal pre-emption. The Supreme Court has not previously addressed: whether the LBIA and the FRSA apply to manufacturers; or, whether the LBIA and the FRSA pre-empt State common law claims based upon a manufacturer's failure to warn or instruct. Accordingly, petitioners respectfully request that their petition for a writ of certiorari be granted.

The District Court correctly concluded that petitioners' claims are not pre-empted by Federal law. Exempting petitioners' failure to warn and instruct claims from federal pre-emption would not "impede the ability of the Secretary of Transportation to implement and enforce specific federal requirements" governing the interstate railroad industry. Requiring General Motors to provide necessary warnings and instructions regarding the proper use of its locomotive engineer's seat will impose no burden upon the railroad industry regarding manufacturing or design that would subject the railroad industry to varying standards from state to state. This Court should hold that General Motors was not entitled to summary judgment, reverse the Second Circuit's decision and remand for trial.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 17, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: February 9, 1999 Decided: June 17, 1999)

Docket No. 97-9636

JOHN M. OGLESBY and LOIS P. OGLESBY,

Plaintiffs-Appellees,

— v. —

DELAWARE & HUDSON RAILWAY COMPANY,

Defendant,

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Before:

WINTER, *Chief Judge*,
VAN GRAAFEILAND, and PARKER, *Circuit Judges*.

* * *

Appendix A

PER CURIAM:

General Motors Corporation ("GM") appeals with permission from Judge Kahn's denial of its motion for summary judgment. *See Oglesby v. Delaware & Hudson Ry. Co.*, 964 F. Supp. 57 (N.D.N.Y. 1997). We reverse and remand with instructions to grant the motion.

BACKGROUND

On August 13, 1986, John Oglesby, an employee of the Delaware and Hudson Railway Company ("D&H"), suffered a back injury when he attempted to adjust the position of an engineer's (or cab) seat in a locomotive designed and constructed by GM. In order to facilitate the desired adjustment, a trainman is supposed to release the seat from its three-legged mount so that the assembly can be moved with relative ease. Assertedly unaware of the preferred procedure, Oglesby attempted to move the assembly without first releasing the seat. In the process, he wrenched his back.

Oglesby's action against D&H, brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, has been settled. His surviving claim against GM is based on its alleged failure to give him instructions concerning the use of the seat.[1] Oglesby makes no claim in this court that the seat was defectively designed or manufactured. Relying on state common law, he contends that GM should have placed

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1. Although Oglesby's wife is a party to this action, her claim is a derivative one, and it will be deemed included where pertinent under the term "Oglesby."

a warning or instructional label on the seat informing employees of the easier adjustment procedure.

GM moved for summary judgment on the ground that Oglesby's alleged common-law tort claim was preempted by the Locomotive Boiler and Inspection Act ("BIA"), 49 U.S.C. §§ 20701-20903, and/or the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. §§ 421 *et seq.* (repealed in 1994 and reinstated in substance in 49 U.S.C. §§ 20101 *et seq.*). The district court denied GM's motion, but, pursuant to 28 U.S.C. § 1292(b), it certified this question for an immediate appeal, which we agreed to hear.

DISCUSSION

In our *de novo* review of the district court's denial of GM's summary judgment motion, we must determine whether a manufacturer's failure to warn or instruct falls within the parameters of the BIA because, if it does, this claim is preempted. We, therefore, first examine whether a failure to warn or instruct falls within the scope of the statute. Because we find that it does, we then address Oglesby's contentions that the BIA does not apply to manufacturers or to common law causes of action. Because we hold that the BIA does apply in both situations, we reverse with instructions to grant GM's motion for summary judgment.[2]

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2. Because we find that this claim is preempted by the BIA, we need not reach the issue of whether the FRSA preempts this action as well.

Appendix A

A. *The Scope of the BIA*

Congress first enacted the BIA in 1911.[3] Through this and other acts, it conferred on the Interstate Commerce Commission (and now the Department of Transportation) full authority over virtually all aspects of locomotive safety to the exclusion of the states.

In *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), the Supreme Court held that Congress, through the BIA, clearly intended the federal government to occupy the field of locomotive safety. *See id.* at 613. States must therefore "leave all regulatory activity in that area to the federal government," and any state law that attempts to regulate within the domain is preempted. *Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The *Napier* Court also addressed the breadth of the federal government's authority under the BIA: "[the

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3. The BIA reads, in relevant part, as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances —
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury. . . .

49 U.S.C. § 20701.

authority] extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. A decade later, the Supreme Court again expounded upon the extent of the statute, stating that the BIA encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order to the [Secretary.]" *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936).

Appellees contend that GM's alleged failure to provide an instructional label on its cab seat does not fall within these broad parameters and hence is not preempted. This argument begins from an incorrect premise: the relevant inquiry is not whether a label falls under the BIA but whether a cab seat does. That such a seat is within the scope of the BIA is obvious. Indeed, the Secretary of Transportation has issued a regulation dealing with cab seats. *See* 49 C.F.R. § 229.119(a).

Oglesby nonetheless attempts to draw a dichotomy between safety devices and instructional labels and contends, in essence, that state regulations requiring the latter are not preempted. In short, because Oglesby's suit demanded "a label instructing an individual on the proper use of the . . . cab seat," *Oglesby*, 964 F. Supp. at 63, the BIA does not apply. However, this is a distinction without a difference: the very purpose of such instructions would be to protect Oglesby's safety. Moreover, if we adopted such a distinction, states could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to

post them. Such a result would undermine the goal of the BIA, which is to prevent "the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (three-judge court) (Friendly, J.).

Appellees further contend that "a warning regarding the specific cab seat made by a specific manufacturer would never appear in a rule regarding cab seats by the Secretary [of Transportation]," *Oglesby*, 964 F. Supp. at 63, but this contention — even if accurate — does not negate preemption by the BIA. *Napier* states in no uncertain terms that the relevant question is not whether the federal government has exercised its authority but whether it possesses the power in the first place. *See Napier*, 272 U.S. at 613 ("The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power."). No claim is made that the Secretary of Transportation could not issue a manufacturer-specific rule pursuant to the BIA. Indeed, the argument fails to recognize that the Department of Transportation has issued manufacturer-specific regulations in other contexts. *See, e.g.*, Airworthiness Directives; Boeing Model 737-100, -200, -300, -400, and -500 Series Airplanes, 62 Fed. Reg. 60810 (Federal Aviation Admin., Dep't of Transp. 1997) (to be codified at 14 C.F.R. pt. 39) (proposed Nov. 13, 1997); General Motors Corporation; Grant of Application for Decision of Inconsequential Noncompliance, 62 Fed. Reg. 15969-01 (Dep't of Transp. 1997). Moreover, the federal government could certainly promulgate a rule requiring each manufacturer to attach a label explaining how to adjust its

cab seat. *See Law v. General Motors Corp.*, 114 F.3d 908, 911 (9th Cir. 1997) (stating that Transportation Secretary has frequently required attachment of warning labels under BIA). Appellees have not, therefore, provided a compelling argument that a label regarding use of a cab seat is outside the parameters of the BIA.

The label that Oglesby claims is required falls squarely within the field of employment hazards that the BIA was intended to cover. Nothing in the FRSA (or any other statute) modifies this conclusion. *See Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

B. *Does the BIA Apply to Manufacturers and Does It Preempt Common Law Causes of Action?*

Oglesby makes two additional arguments as to why the BIA does not apply in the instant case: (i) the BIA applies only to railroad carriers and not to manufacturers of component parts and (ii) the BIA preempts only state statutes and not common law claims. We disagree.

Although the word "manufacturer" does not appear in the BIA, the scope of the Act includes both the "design" and "construction" of a locomotive's parts. *Napier*, 272 U.S. at 611. Two other circuits have addressed the issue of whether the BIA includes manufacturers, and we agree with their conclusion that it does. *See Springston*, 130 F.3d at 244; *Law*, 114 F.3d at 911-12. *But see Lorincie v. Southeastern Penn. Transp. Auth.*, 34 F. Supp.2d 929 (E.D. Pa. 1998) (holding that BIA does not apply to manufacturers). Where,

as here, the design and construction of a part are in the hands of a manufacturer, the results that Congress had hoped to obtain through the BIA would be accomplished best by including the manufacturer within the statute's coverage.

Oglesby's contention that the BIA serves only to preempt state statutory enactments but not common law remedies is equally unavailing. In reaching this conclusion, we again agree with the two other circuits that have addressed this issue. *See Springston*, 130 F.3d at 244-45 (BIA bars claims for common-law negligence for failure to install devices beyond those required by federal law); *Marshall*, 720 F.2d at 1152 (same). This holding is necessary to keep the locus of regulation at the federal level and maintain the uniformity that is a goal of the BIA. As the Supreme Court has noted, an award of damages can act as a "potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). For a locomotive carrier or manufacturer, the source of the damages, whether statutory or common law, is irrelevant, and both must therefore be preempted by the BIA. *Cf. Gilbert v. Burlington Indus.*, 765 F.2d 320, 327-28 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) (recognizing that ERISA, which occupies the field of employee benefit plans, *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), preempts state claims whether raised under state statutes or at common law).

In sum, we hold that Oglesby's common law action against GM has been preempted by the BIA, and GM's motion for summary judgment should have been granted. We therefore reverse the decision of the district court and remand with instructions to grant the motion.

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED AND FILED FEBRUARY 10, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

86-CV-1133
(LEK/RWS)

JOHN M. OGLESBY,

Plaintiff,

-against-

DELAWARE AND HUDSON RAILWAY COMPANY and GENERAL MOTORS CORPORATION,

Defendants.

* * *

MEMORANDUM-DECISION AND ORDER

Presently before the Court is a motion for summary judgment filed by the defendant General Motors Corporation ("GM"). Also before the Court is plaintiff's cross-motion to reinstate several previously dismissed claims. Oral arguments on this matter were heard on October 18, 1996, in Albany, New York. Decision was reserved.

Appendix B

I. *FACTS*

This action brought under the Federal Employer's Liability Act ("FELA") has had a long and arduous journey through the Court since its inception over ten years ago. On August 13, 1986, plaintiff John M. Oglesby ("Oglesby"), a trainman employed by the defendant Delaware and Hudson Railway Company ("D&H"), allegedly suffered a severe lower back injury while attempting to adjust the position of an engineer's seat located on a locomotive. The seat, designed by GM, consists of a platform connected to a pin and a tripod mount which is in turn attached to a track along the side of the engine wall. Hon. Con. G. Cholakis, Memorandum-Decision and Order, July 19, 1994. The design allows the seat to be moved horizontally along the track so that the engineer can access different sections of the train engine. *Id.* By removing the pin from the tripod mount which weighs 11 pounds, the seat, which weighs 62 pounds, can be removed from the rest of the assembly so that the apparatus can be moved more easily. *Id.*

Plaintiff alleges that his injury occurred while attempting to move the seat. Specifically, Oglesby claims that on a first attempt, he was unable to move the assembly. On a second attempt, during which he applied more force, the apparatus moved suddenly and he sustained a severe back injury in a twisting fall. Plaintiff asserts that the design of the chair and track produced too much friction and therefore required a dangerous amount of effort to move the seat. Oglesby did not remove the chair from the rest of the assembly and claims that he was not warned that injury could occur if he failed to do so. The Plaintiff argues that a warning or instruction label

should have been placed on the cab seat by GM. Defendant has conceded that there were no warnings on the assembly and that it never safety tested the product. *Id.* The amended complaint raises claims of product liability including defective design, defective manufacture and failure to warn as well as claims based in negligence and breach of warranty.

In the Memorandum-Decision and Order dated July 19, 1994, the claims relating to defect in design and manufacture were dismissed against GM on the grounds that the plaintiff's expert was not qualified and therefore the plaintiff's claims were unsupportable. Shortly thereafter, the parties stipulated to the withdrawal of the state law claims based on breach of warranty on statute of limitations grounds. Thus, the only claim remaining against GM is for negligent failure to warn.

On January 23, 1995, Judge Cholakis granted the plaintiff's request to reopen discovery for the limited purpose of obtaining and deposing a new expert. On November 17, 1995, Judge Cholakis granted GM's motion to file its third amended answer. The current summary judgment motion followed. GM's motion is based on the theory that federal law, specifically the Locomotive Boiler Inspection Act and the Federal Railroad Safety Act, occupy the entire field of law and therefore the plaintiff's tort claim is preempted. After securing a new expert and completing the discovery process in that regard, the plaintiff now moves to reinstate the defective manufacture and design claims which were previously dismissed. Each motion will be addressed in turn.

II. *DISCUSSION*

A. Summary Judgment Standard

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Lang v. Retirement Living Pub. Co.*, 949 F.2d 576, 580 (2d Cir. 1991). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Project Release v. Prevost*, 722 F.2d 960, 968 (2d Cir. 1983).

When the moving party has met the burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. At that point, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56: *Liberty Lobby Inc.*, 477 U.S. at 250; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. To withstand a summary judgment motion, evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-249; *Matsushita Elec. Indus. Co.*, 475 U.S. at

587. Thus, summary judgment is proper where there is "little or no evidence . . . in support of the non-moving party's case." *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1223-1224 (2d Cir. 1994) (citations omitted).

1. Federal Preemption

Defendant contends that the plaintiff's tort claims are preempted by federal law. Generally, "[w]here a state statute conflicts with or frustrates federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) (citing U.S. Const., Art. VI, cl.2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *CSX Transp.*, 507 U.S. at 664 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)).

"Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Cipollone*, 505 U.S. at 516 (quoting *Jones v. Rath Packaging Co.*, 430 U.S. 519, 525 (1977)). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law . . . ." *Id.* (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190,

204 (1983)). In addition, state law is preempted if the "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Id.* (quoting *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (quoting *Rice*, 331 U.S. at 230)).

Defendant asserts that both the Locomotive Boiler Inspection Act and the Federal Railroad Safety Act provide grounds for preemption of the plaintiff's claim.

a. Preemption Under the Locomotive Boiler Inspection Act

GM argues that the federal Locomotive Boiler Inspection Act ("LBIA") preempts any state or local regulation covering the same subject, in this instance, the plaintiff's failure to warn claim. Defendant contends that 49 C.F.R. § 229.119 (1996) addresses locomotive engineer seats and therefore preemption applies.[1] Plaintiff asserts that the preemption only applies to railroads, not manufacturers such as GM. Oglesby further argues that the specific section cited by GM does not expressly address the issue of failure to warn or the proper weight of the seat or its functional design.

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1. The section, in pertinent part, reads:

> Cabs, Floors, and Passageways.
>
> (a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

49 C.F.R. § 229.119(a) (1996).

Appendix B

The LBIA prohibits railroads from operating trains unless "its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate . . ." and that the trains "be employed in the active service of such carrier without unnecessary peril to life or limb . . . ." 45 U.S.C.A. § 23 (1986). "The [L]BIA supplements the FELA to provide additional public protection and facilitate employee recovery." *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1488 n. 1 (10th Cir. 1988) (citing *Urie v. Thompson*, 337 U.S. 163, 189 (1949)). The LBIA "is to be liberally construed in the light of its primary purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly v. Grand Trunk, W.R.R.*, 317 U.S. 481, 486 (1943). "Liability under the FELA is premised on the railroad's negligence, however small." *King*, 855 F.2d at 1488 n. 1 (citing 45 U.S.C. § 51; *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508-09 (1957)). "In contrast, the [L]BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb." *Id.* (citing *Lilly*, 317 U.S. at 485). "The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 15 (1938) (citations omitted).

"The scope of preemption under the [LBIA] is determined by the interpretation of the words 'parts and appurtenances.' " *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (1983). "The Supreme Court interpreted the phrase . . . as encompassing '[w]hatever the fact is an integral or essential part of a completed locomotive, and all

parts or attachments definitely prescribed by lawful order of the [Secretary] . . . .' " *Id.* (quoting *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936)).

Defendant cites a litany of cases that illustrate the LBIA's preemptive effect. The common theme among them is that the LBIA prohibits state regulations which directly conflict with the safety protocol set forth in the Act. For example, in *Napier v. Atlantic Coast Line*, the Supreme Court ruled that a Georgia statute which required an "automatic door to the firebox" on a locomotive was preempted by the LBIA. 272 U.S. 605, 607 (1926). The Georgia regulation indisputably raised the level of safety over that prescribed in the LBIA. However, the Court commented that it was the duty of the Commission to "prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612. Ultimately, it was found that Congress intended the LBIA "to occupy the entire filed." *Id.* at 613. Despite the fact that the Georgia regulation promoted safety to a greater extent than the Act itself, it was noted that "the fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *Id.* at 613. "Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Id.* The Court concluded its decision by noting that "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Although this issue has never been addressed by the Second Circuit, similar state statutes were found to be

preempted by the LBIA in various circuits and districts across the country. For example, in *Missouri Pacific R.R. v. Railroad Comm'n of Texas*, the Sixth Circuit considered a Texas statute that required railroads to use cabooses for safety purposes. 850 F.2d 264, 268 (6th Cir. 1988). In holding that the regulation was preempted by the Federal Railroad Safety Act ("FRSA"), it was noted that under the LBIA, "virtually all state regulations affecting the train itself appear to be preempted by federal law." *Id.* In addition, in *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, a district court found that a Pennsylvania statute requiring the use of speed recorders and indicators was found to be preempted by the LBIA and FRSA. 536 F.Supp 653 (1982). While it is without question that state statutes which attempt to cover the same area as the LBIA are preempted, it must be determined whether a state tort claim is also preempted under the LBIA.

i. Preemption of Common Law Claims Under the LBIA

Once again, the Second Circuit has not addressed the question of LBIA preemption of common law claims. However, the Ninth Circuit determined that a plaintiff was not entitled to damages for the common law tort of the wrongful death of her husband after she argued that the train which struck him at a railroad crossing did not have adequate warning equipment. *Marshall*, 720 F.2d 1149, 1152 (1983). The court concluded that "under the [Locomotive] Boiler Inspection Act the state may not impose liability for failure to install a part or attachment of a locomotive if it is 'within the scope of the authority delegated to the [Secretary]' to

prescribe the same part or attachment." *Id.* (quoting *Napier*, 272 U.S. at 611). The Ninth Circuit determined that it was within the "Secretary's authority to prescribe strobe or oscillating lights for locomotives, and any state regulation is therefore preempted." *Id.*

On its face, *Marshall* could be viewed as supporting the defendant's argument that the realm of cab seating is preempted by the LBIA. However, the LBIA regulations involving warning lights are much more detailed than those involving cab seats. While the regulation involving cab seats merely states that "[c]ab seats shall be securely mounted and braced," 49 C.F.R. § 229.119 (1996), the regulations for warning lights and headlights are much more precise.[2] In

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2. The regulation reads:

> (a) Each headlight used in road service shall have a headlight that produces at least 200,000 candela. If a locomotive or locomotive consist in road service is regularly required to run backward for any portion of its trip other than to pick up a detached portion of its train or to make terminal movements, it shall also have on its rear a headlight that produces at least 200,000 candela. Each headlight shall be arranged to illuminate a person at 800 feet ahead and in front of the headlight.
>
> (b) Each locomotive or locomotive consist used in yard service shall have two headlights, one located on the front of the locomotive or locomotive consist and one on its rear. Each headlight shall produce at least 60,000 candela and shall be arranged to illuminate a person at least 300 feet ahead and in front of the headlight.

(Cont'd)

short, the regulations require a specific power amount for the headlights, a minimum illumination distance, and requirements for lighting on the rear of the locomotive. *See* 49 § 229.129 (1996). This regulation sets forth specific and adequate specifications for headlights. Any state regulation in the area of warning lights would most likely conflict with the LBIA regulations and preemption seems perfectly appropriate. In contrast, the simple requirement that cab seats be "securely mounted and braced" leaves much unanswered. Surely, it is not difficult to imagine a cab seat that is sufficiently secured and braced, yet is woefully defective in design and can cause serious injury to a user.

However, the *Marshall* does hold that common law claims can be preempted under the LBIA. Thus, the Court will continue the analysis under the assumption that a plaintiff's state common law claim could be preempted under the LBIA.[3]

(Cont'd)

> (c) Headlights shall be provided with a device to dim the light.

49 C.F.R. § 229.125 (1996).

3. Plaintiff contends that the LBIA preempts suits only against a railroad and not against a manufacturer. The Court is unconvinced. The logic behind field preemption does not support the premise that one defendant would be excused from suit and a different defendant would be open to suit on the same legal theory. Several courts have found that common law claims which are legitimately preempted under the LBIA because they conflict with the Act are invalid against both a railroad and manufacturer. *See Springston v. Consolidated*

(Cont'd)

ii. Plaintiff's Failure to Warn Claim

In support of the argument that the plaintiff's failure to warn claim is also preempted under the LBIA, defendant cites *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485 (10th Cir. 1988). *King* is a product liability action against a railroad for an allegedly defective cab seat. *Id.* In *King*, the plaintiff, a railroad brakeman, brought suit against the railroad for alleged injuries he sustained during a collision between the locomotive he was running and a truck at a railroad crossing. *Id.* at 1486. Many of Southern Pacific's ("SP") trains had armrests on the cab seats, and under its contract with the railroad union, SP was obligated to provide them. *Id.* However, the cab seat in which the plaintiff was sitting did not have armrests. Plaintiff brought an action under the LBIA alleging that he sustained injuries which could have been avoided had the railroad installed armrests and seat belts as additional safety devices in their cab seats.

The court distinguished cases involving failure to maintain a locomotive and its appurtenances and claims involving a railroad's failure to "install additional safety devices which the Secretary of Transportation has not seen fit to require." *Id.* at 1489. While acknowledging that the LBIA should be liberally construed to protect those injured, it was noted that "it is whatever 'in fact is an integral or

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Rail Corp., 863 F.Supp. 535 (N.D. Ohio 1994) (common law claims against railroad and manufacturer involving inadequate warning devices preempted by the LBIA); *Law v. General Motors Corp.*, 1995 WL 542496, *6 (N.D.Cal. 1995) (state causes of action preempted by LBIA's occupation of the field).

essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary]' that is within the statute's reach." *Id.* at 1490 (citing *Lunsford*, 297 U.S. at 402). In finding that the claim did not fall under the LBIA, the court concluded that armrests did not rise to the level of being an essential part of a completed locomotive and noted that in 49 C.F.R. § 229.11(a), armrests were simply not considered.

While *King* is more on point than *Marshall*, it is easily distinguishable. By arguing that plaintiff's state tort claim is preempted by the LBIA, the defendant is asserting that if the plaintiff were successful, it would subvert the requirements set forth in the Act. In other words, if the plaintiff were to prevail on his failure to warn claim, the essence of the outcome would be that the manufacturer should have included an instruction label on the seat that would have warned of possible injury if the seat were moved without following certain precautions. The end result would be that labels would have to be present to avoid liability. The defendant argues that by requiring the addition of that label to the seat, the supremacy of the LBIA requirements is lost since no such requirement exists under the Act. This argument is not convincing.

A main theme that runs through all of the cases discussed is uniformity. The LBIA sets forth a minimum level of safety standards which are uniform across the nation. This assists railroads in their quest for interstate commerce and avoids the difficulties associated with conflicting safety standards when crossing state boundaries. Armrests, headlights, seat belts, speed indicators, cabooses, and firebox doors are all

safety related. Each of these items could be and many have been the subject of detailed rules set forth by the Secretary. The plaintiff's claim for failure to warn demands a label instructing an individual on the proper use of the specific cab seat manufactured by GM. An instruction label is not a safety device. On the contrary, a warning regarding the specific cab seat made by a specific manufacturer would never appear in a rule regarding cab seats by the Secretary. Thus, while certain common law claims against manufacturers have been preempted because they conflicted with the LBIA, a label which instructs an individual on the proper use of a specific does not fall into the same category.

Defendant asserts that the LBIA requires labeling in several different areas covered by the regulations and therefore the Secretary would have chosen to require a label for cab seats if a label was needed. Defendant cites several rules that involve labeling, but none of them involve the proper use of the item that is labeled.[4] Quite simply, it is beyond the scope of the Secretary's vision to require labels for the proper use of certain equipment which varies from manufacturer to manufacturer. The duty of instructing a user to avoid possible injury rests solely with the entity that manufactures the item. Therefore, the Court concludes that

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4. 49 C.F.R. § 210.27(d) involves a tag which states the results of a noise level test; § 215.9(a)(3) concerns the tagging of railroad cars which need repair; § 215.303 involves the labeling of restricted freight cars; § 218.73 concerns the labeling of cars which are occupied; § 223.17 covers glazing car windows; § 229.85 discusses a warning for the presence of high voltage equipment; and § 229.113 covers a warning that is placed upon steam generators that are malfunctioning.

the failure to warn claim against GM for the proper use of the cab seat is not preempted under the LBIA.

b. Preemption Under the Federal Railroad Safety Act[5]

Congress enacted the Federal Railroad Safety Act ("FRSA") in 1970 to "promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C.A. § 421 (repealed 1994). The FRSA further provides that the Secretary shall "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970."[6] 45 U.S.C.A. § 431 (repealed 1994).

Preemption under the FRSA is set forth in § 434. 45 U.S.C.A. § 434 (repealed 1994).[7] Under that section, the

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5. It is important to note that Congress repealed the Federal Railroad Safety Act in 1994. 45 U.S.C.A. §§ 421 and 431-447 (Supp. 1996). However, the Court will continue with an analysis since the statute was in effect during the relevant time in this action.

6. Thus, the FRSA is meant to supplement, not replace, the LBIA.

7. The section reads:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be

(Cont'd)

Appendix B

> States are permitted to 'adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement.' Even after federal standards have been promulgated, the States may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards are 'not incompatible with' federal laws or regulations and not an undue burden on interstate commerce.

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993). Thus, unlike the LBIA, the FRSA offers the State's the power to adopt more stringent regulations in certain circumstances.

(Cont'd)

> nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C.A. § 434 (repealed 1994).

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Defendant cites *CSX* as authority for preemption of the plaintiff's claim. In that case, the plaintiff brought a wrongful death action against a railroad stemming from an accident which occurred at a railroad crossing, killing Thomas Easterwood. *Id.* at 661. The wife of the Easterwood claimed that the defendant was "negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed." *Id.* It was determined that the plaintiff's excessive speed claim was preempted because the Secretary had set forth detailed regulations regarding locomotive speed. *Id.* at 673-75. However, the Court found that the plaintiff's claim for failure to maintain the railroad crossing under Georgia law was not preempted because federal funds were not utilized in the improvement of the crossing in question, and therefore the FRSA did not apply. *Id.* at 672-73.

As discussed in detail in the prior section, the label in question in the case at bar is not a safety device and would not be the subject of a regulation of the Secretary or of a state. Rather, the label is merely an instructive device so that a user would know the proper method of moving the cab seat. Because there is no question of a regulation, there is therefore no way that preemption could apply. Thus, the plaintiff's failure to warn claim is not preempted under the FRSA.

B. *Plaintiff's Motion to Reinstate Dismissed Claims and The "Law of the Case" Doctrine*

Plaintiff's have cross-moved to reinstate the claims which were dismissed by Judge Cholakis in his July 19, 1994

Memorandum-Decision and Order. Plaintiff requests the Court to exercise its revisionary powers under Fed. R. Civ. P. 54(b). Plaintiff asserts that Judge Cholakis permitted Oglesby to retain a new expert and that justice requires that the dismissed claims be reinstated. Defendant asserts that the "law of the case" doctrine should apply and that plaintiff should not get a "second bite at the apple" after failing to meet their burden of proof at the earlier summary judgment motion.

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 7-8 (1996) (citing *DiLaura v. Power Auth. of the State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (quoting *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991)). The Court finds that the law of the case should stand and that the previously dismissed claims should not be reinstated.

Finally, the plaintiff has requested leave to amend their answers to defendant's interrogatories to assert a failure to warn claim sounding in strict liability. Defendant has not opposed this request. Because the failure to warn claim is the only claim left and there is no opposition, the request is granted.

Accordingly, it is ORDERED that the defendant's motion for summary judgment is DENIED; and it is further

ORDERED that the plaintiff's cross-motion to reinstate the previously dismissed claims is DENIED; and it is further

Appendix B

ORDERED that plaintiff's request to amend their answers to the defendant's interrogatories is GRANTED; and it is further

ORDERED that the Clerk shall serve a copy of this order on all the parties by regular mail.

IT IS SO ORDERED

s/ Lawrence E. Kahn
Honorable Lawrence E. Kahn
United States District Judge

Dated: February 10, 1997
Albany, New York

Supreme Court, U.S.
FILED
OCT 14 1999
OFFICE OF THE CLERK

No. 99-445

In The

Supreme Court of the United States

JOHN M. OGLESBY and LOIS P. OGLESBY,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the federal Locomotive Inspection Act preempt state-by-state regulation, including by the common law, of the design, construction and labeling of the locomotive, its parts and appurtenances?

II. Does the Federal Railroad Safety Act preempt state-by-state regulation, including by the common law, of the design, construction and labeling of the locomotive, its parts and appurtenances?

STATEMENT OF PARTIES

The petitioners are John M. Oglesby and Lois P. Oglesby,[1] plaintiffs in the district court and appellees before the court of appeals. The respondent is General Motors Corporation ("GM"), defendant in the district court and appellant before the court of appeals. Mr. Oglesby's former employer, the Delaware and Hudson Railway Company, was a defendant under the Federal Employers' Liability Act, but settled in the district court.

Pursuant to Supreme Court Rule 29.6, GM states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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[1] Petitioner's wife, Lois Oglesby, claims derivative damages for loss of consortium. Throughout this brief we refer to them together as "petitioner."

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TEXT OF PROVISIONS INVOLVED

In addition to the portions of the Locomotive Inspection Act and Federal Railroad Safety Act quoted by petitioner (Pet. 7-8), Article VI, clause 2 of the United States Constitution is involved. It provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

STATEMENT OF THE CASE

On August 13, 1986, petitioner, a trainman for the Delaware and Hudson Railway, allegedly sustained a back injury while moving the engineer's seat aboard a locomotive designed and manufactured by General Motors (GM).

Federal regulations require that the seat be securely mounted and braced. 49 C.F.R. § 229.119(a). To meet the user's needs, the seat also needs to be adjustable forward and backward. To accomplish both, the seat is mounted on a tripod that slides along a track. The seat, 62 pounds, can be removed before moving the tripod, as petitioner knew. But he did not remove it, instead pushed the whole, heavy assembly, and, he claimed, so twisted his back.

Petitioner brought this action against his employer and GM, but settled his FELA claim against his employer. Against GM, his complaint alleged a "defect in the design" of the seat and negligence and strict liability for

"failing to warn of the aforesaid defect."[2] The claim was made under New York law; petitioner admitted – and admits here – that GM met all requirements of federal law. (Pet. 15)

All claims other than for failure to warn were withdrawn or ended in summary judgment for GM on grounds unrelated to preemption.[3] GM then moved for summary judgment on the failure-to-warn-of-the-alleged-defect claim, contending it was preempted by the Locomotive Inspection Act ("LIA"), 49 U.S.C. §§ 20701-20903, because it fell squarely within the field that LIA has occupied for over 70 years. *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926). GM also contended the claim was preempted by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20143, which preempts state law when a federal standard

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[2] Petitioner's representations that the failure-to-warn claim does not "disput[e] the design of the seat" or "touch upon standards of design" (Pet. 21, 26) are incorrect, and first surfaced on appeal. The warning claim depends on the design defect charge, and turns on it. Thus all of the alleged dangers to be warned about are without dispute consequences of the claimed shortcomings in the design. Accordingly, the complaint alleges that GM "fail[ed] to warn of the aforesaid defect," petitioner's interrogatory answers state that "GM should have warned [plaintiff's employer] and plaintiff of the potential risk of severe harm due to the defective design of the engineer's seat and appurtenances," and instructed how to move the seat as designed; and petitioner's papers opposing GM's initial summary judgment conclude "the design of the engineer's seat . . . was such that it required a warning."

[3] The trial court granted GM summary judgment on the design-defect claim after finding plaintiff's design expert unqualified.

"cover[s] the subject matter of the State requirement." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (common-law claim preempted).

The district court acknowledged the "litany of cases" holding that LIA preempts state law within the field LIA occupies, but denied summary judgment, finding no "direct[ ] conflict" with LIA or "detailed" federal regulations (although field, not conflict, preemption was in issue). (Pet. App. B at 14a-23a)

On appeal under 28 U.S.C. § 1292(b), the Second Circuit held that LIA preempted petitioner's claims. In line with *Napier* and every federal circuit to address the issue, it held that the field LIA occupies is defined by the authority that LIA grants the Secretary of Transportation; that the field specifically includes the design and construction of the locomotive and all its parts and appurtenances; that the locomotive seat and warnings with respect to it are well within that field; and that petitioner's common-law claims against GM regarding the locomotive seat's design and warnings in respect to it are therefore also well within that field. (Pet. App. A) Accordingly, the Second Circuit found that LIA preempted petitioner's claims and did not reach FRSA preemption.

SUMMARY OF ARGUMENT

It is settled that LIA occupies the field that is "within the scope of the authority delegated to" the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive and of all

appurtenances." The LIA therefore preempts any state law within that field, regardless whether the state law conflicts with federal regulations on point, or whether there are any federal regulations on point; whether there are or not "is without legal significance." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926). Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable.

Petitioner's state-law claim attacks the locomotive seat's design and warnings in respect to it. Both are indisputably within the Secretary's authority, and plaintiff does not claim otherwise. Hence the claim falls squarely within the preempted field, and so, the court of appeals properly held, is preempted under *Napier*.

Petitioner does not challenge *Napier* or the long line of cases following it. Instead, he protests that his failure to warn claim is not within the occupied field because it does not concern the locomotive seat's design. But it does, directly, and, as a matter of New York law and common sense, must. However, it would not matter if it did not because, without dispute, warnings with respect to the seat are "within the scope of authority delegated to" the Secretary to prescribe, and so within the occupied field.

Petitioner also protests that his state law claim is against a manufacturer, and that LIA does not expressly

apply to manufacturers. But it expressly does, and it also would not matter if it did not. Petitioner's claim is based upon a warning within the Secretary's authority to prescribe, and so remains preempted whether the claim is made against the railroad who buys the locomotive or the manufacturer who builds and sells it. Indeed, permitting states to require manufacturers to comply with varying state rules regarding locomotive parts and warnings would yield exactly the patchwork of conflicting state rules regarding them that LIA and *Napier* are meant to foreclose.

Nor is there any reason for this Court to visit these questions. The Second Circuit's decision accords with at least three other circuits', every one to consider the question. They hold common law claims in respect to locomotive parts and appurtenances, including common law warning claims against manufacturers, are well within the preempted field. Petitioner cites no case that holds otherwise. Therefore, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

The case also presents no FRSA issue at all. The judgment rests on LIA, the court below never reached FRSA, and petitioner presents no question of importance under it in any event.

REASONS FOR DENYING THE PETITION

I. LIA PREEMPTS PETITIONER'S CLAIMS UNDER SETTLED LAW.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987); *Michigan Canners & Freezers Assoc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

It is settled law that LIA occupies the field as to matters within the authority it confers on the Secretary. Petitioner's claim falls within that field. Therefore, it is preempted. When Congress occupies the field, "the states must leave all regulatory activity in that area to the Federal Government." *See Michigan Canners & Freezers*, 467 U.S. at 469.

A. The Settled Rule: LIA Preempts State Law on All Matters Within The Secretary's Authority Under LIA.

For 70 years, since Justice Brandeis' opinion for the Court in *Napier*, 272 U.S. 605, it has been settled that Congress intended LIA to preclude all state law

respecting locomotives and locomotive parts and equipment used in interstate commerce.

Napier expressly held that Congress intended LIA "to occupy the field" in respect to all areas subject to LIA, and that LIA accordingly preempted all state law within LIA's grant of authority to the Interstate Commerce Commission (or its successor, the Secretary of Transportation, via the Federal Railroad Administration[4]). *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court found that LIA conferred on the Commission "general" power to regulate locomotive safety equipment, *id.* at 611-12, and that LIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by LIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there were any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door

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[4] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1192 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

> and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act,[5] as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Petitioner does not question *Napier* (indeed, barely mentions it) and it remains settled law.[6] *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (noting *Napier* holds that LIA occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same). *See also*, following *Napier*, *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (state could not impose failure-to-warn or design-defect liability, because warnings and designs are

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[5] LIA was then known as the Locomotive Boiler Inspection Act ("LBIA" or "BIA").

[6] The 1970 Federal Railroad Safety Act did not alter LIA's preemptive effect. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983).

"within the scope of the Secretary's authority"; "Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment"); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (states cannot impose liability for failure to install warning devices on locomotives because they are "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Missouri Pac. R.R. v. Railroad Comm.*, 850 F.2d 264, 268-69 (5th Cir. 1988) (LIA preempts state requirement for telemetry devices), *cert. denied*, 488 U.S. 1009 (1989). Indeed, in 1983 this Court affirmed a decision that "[t]he LBIA completely preempts the field of locomotive equipment." *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.)[7].

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[7] The only question decided by the lower court in that case was preemption, and the Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

There are at least three reasons for this settled rule. One, locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R.R. v. Pub. Service Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law, 114 F.3d at 910-11 (quoting *Southern Pac. Transp. Co. v. Oregon Pub. Util. Comm.*, 9 F.3d 807, 811 (9th Cir. 1993)); *accord* App. A at 5a-6a; *Marshall*, 720 F.2d at 1153; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245.

Two, Congress decided that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. As FRA explained:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination 43 Fed. Reg. 10,583, 10,585-86 (1978). Thus, as this Court has taught, Congress' scheme leaves no room for ad hoc jury decisions about locomotives, their parts and use:

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521, 530 (1925) (emphasis added).

Three, Congress provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated. Petitioner here brought a FELA claim against his employer, and resolved it.

In sum, it is settled for good reasons that: (1) any state law within the authority delegated to the Commission is preempted, whether or not there are on-point federal regulations, and (2) the "design, the construction and the material of every part of the locomotive . . . and of all appurtenances" is squarely within that preempted field.

B. The Settled Rule Applied: LIA Preempts Petitioner's Claims.

The court of appeals simply applied *Napier* here (App. A at 4a-8a), and agreed with all the other courts of appeals that have likewise applied *Napier* to like claims. The court's analysis was absolutely right, indeed, inevitable.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances."[8] (P. 7, above) The engineer's seat is obviously a locomotive "part" or "appurtenance." Therefore, its design and construction are within the Secretary's authority and the preempted field; the Secretary's issuance and consideration of regulations on locomotive cab seat design, under authority of LIA, underscore that it is.[9] 49 C.F.R. § 229.121(a) (cab seat shall be "securely mounted and braced"). *See also* Passenger Equipment Safety Standards, 62 Fed. Reg. 49728, 49770, 49783, 49806, 49821, 49823 (1997) (proposed rules governing cab seat design on passenger-train locomotives); Special Safety Inquiry; Locomotive Control Cab Safety, 53 Fed. Reg. 36936,

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[8] Thus, for example, LIA preemption covers: warnings, engines, brakes and insulation, *Law*, 114 F.3d at 909-10; speed recorders and indicators, *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982); headlights and reflective tape, *Springston*, 130 F.3d at 243-45; *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (same); horns, *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998); fire extinguishers and first-aid kits, *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); bell ringers, *Hines v. Smith*, 275 F. 766, 767 (7th Cir. 1921); radios, *Green v. River Terminal Ry.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); and of course fire boxes and cab curtains. *Napier*, 272 U.S. at 611-13. In short, "virtually all state regulations affecting the train itself appear preempted by federal law." *Missouri Pac. R.R. v. Railroad. Comm.*, 850 F.2d 264, 268 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

[9] They were also adopted under authority of the FRSA. *See* 49 C.F.R. Part 229, Authority note (citing both LIA and FRSA sections of 49 U.S.C.).

36938-39 (1988) (notice that FRA is reviewing cab seat design and other aspects of locomotive interiors). Petitioner's suggestion that federal regulation does not deal with "all aspects of cab seat design" (Pet. 21) is irrelevant; LIA preempts all matters within federal authority, exercised or not. *Napier*, 272 U.S. at 613; pp. 7-8, above.

Likewise, "warning requirements [with respect to locomotive parts and appurtenances] . . . are within the scope of the Secretary's authority – an authority which the Secretary has often invoked," and so are within the preempted field. *Law*, 114 F.3d at 911 (citing examples); App. A at 6a-7a. Indeed, petitioner does not claim otherwise, nor could he. The FRA is "broadly authorized [by LIA] to set the standards of compliance" for locomotives, to "remove unnecessary peril," and simply to "remedy shortcomings, other than purely mechanical defects, which may make operation unsafe." *Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481, 486-88 (1943) (LIA authorized ICC to impose a "continuing duty" to keep railway walkway clean; Act cannot be limited to cover "only defects in construction or mechanical operation") (citation omitted). FRA regulations, issued under the authority of LIA, in fact mandate numerous warnings and labels, particularly in the locomotive cab. *See* 49 C.F.R. §§ 210.27(d) (locomotive cab must bear label concerning wayside noise emission level); 229.113 (locomotive cab must bear warning label when steam generator has been shut down because of defect); 223.17 (cab of complying locomotive must bear label concerning window safety glazing); 229.47(a) (locomotive cab must contain sign indicating emergency brake valve); 229.11 (locomotive must bear serial number); 229.85 (any high-voltage

equipment must bear warning notice); 215.9(a)(3) (defective freight car must bear warning label); 215.301-215.303 (labeling of restricted freight cars and of other rolling stock); 218.73 (warning labels for occupied camp cars); 49 C.F.R. Part 229 Authority note.[10]

But, petitioner argues, warning claims as to parts aren't preempted although parts claims are, because a warning is not, itself, a part or appurtenance. (Pet. 21) Petitioner misses, and ignores, the point. Whatever the metaphysical definition of a "part" or "appurtenance," warnings are within the scope of the Secretary's authority to prescribe, and so well within the preempted field.

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[10] Petitioner says the FRA's existing warning requirements are not "intended to instruct a worker how properly to use a part," as he mistakenly asserts his claimed warning would. (Pet. 19; *see* p. 2 n. 2, above) That is a distinction without a difference; indeed, New York law recognizes no such distinction, and petitioner cites no authority suggesting that it does. Moreover, whether a warning merely alerts the user to a supposed defect or instructs how to avoid it has no relation to the threat of varying state regulation, FRA's superior expertise, or any other matter bearing on preemption. And an "instructional" warning, like any other, is well within the Commission's authority to prescribe, the Transportation Department is fully capable of requiring one, and has. *See, e.g.*, Boeing Model 737-100, -200, -300, -400, and -500 Series Airplanes, 62 Fed. Reg. 60810 (1997) (Federal Aviation Administration, Department of Transportation) (proposed rule requiring warning placard near a specific valve on particular manufacturer's airplanes); McDonnell Douglas Model DC-9-10, -20, and -30 Series Airplanes Equipped with a Non-ventral Aft Pressure Bulkhead, 55 Fed. Reg. 10601 (1990) (Federal Aviation Administration, Department of Transportation) (mandating posting of specific instructions near exit on particular manufacturer's airplanes).

Indeed, it would seriously compromise safety were a court to rule that the Secretary was not authorized to require warnings.[11] Furthermore, a patchwork of varying state warning laws within that the preempted field – like any other state laws within it – would destroy uniformity. That is, again, exactly what LIA and *Napier* are meant to foreclose. *Napier*, 272 U.S. at 613; *Law*, 114 F.3d at 911; pp. 10-11, above.

But, petitioner continues, his warning claim does not "dispute the design of the seat" or allege a defect in it. (Pet. 21, 26) But his warning claim specifically turns on the design of the seat and specifically alleges a defect in it. In fact, petitioner's charge is and must be that GM failed "to warn of the aforesaid defect" p. 2 n. 2, above; there can be no duty to warn under New York law unless the product is inherently or unreasonably dangerous – in other words, defective – absent the warning. *See*

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[11] It would also seriously compromise safety were warnings required that the Secretary has not chosen to require. Too many warnings divert attention from important ones, and dilute them. J. Henderson & A. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265 (1990); M. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. Rev. 121, 140 (1992); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984); *Broussard v. Continental Oil Co.*, 433 So.2d 354, 358 (La. App. 1983), *cert. denied*, 440 So.2d 726 (La. 1983); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid informational overload") (emphasis added; citation and internal ellipses omitted); *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 360 (Tex. 1993) (the more instructions, the less likely one will be noticed).

McLaughlin v. Mine Safety Appliances Co., 226 N.Y.S.2d 407, 411 (N.Y. 1962) (duty to warn if product "inherently dangerous"); *Gordon v. Goldman Bros., Inc.*, 515 N.Y.S.2d 39, 40 (A.D.) (no duty to warn where product not inherently dangerous), *app. denied*, 522 N.Y.S.2d 110 (N.Y. 1987); *Young v. Elmira Transit Mix., Inc.*, 383 N.Y.S.2d 729, 731 (A.D. 1976) ("unreasonable risk of harm" from "latent danger" triggers duty to warn).

In short, petitioner alleges that GM failed to warn of the alleged design defect, so his claim requires proof of the defect claim that *Napier* indisputably preempts. (Pp. 7-9, 13-14, above) And indeed, petitioner's warning claim would, if allowed, undo *Napier*. For if petitioner could get around *Napier* by labeling his defect claim a failure-to-warn-about-that-defect claim, so could virtually any plaintiff: any design-defect claim can be transformed into a failure-to-warn-of-the-design-defect. *See* App. A at 5a-6a.

In sum, warnings in respect to the locomotive seat are well within the Secretary's authority to prescribe, and petitioner does not claim otherwise. Therefore, petitioner's warning claim is, without dispute, within the preempted field. Accordingly it is preempted.

C. Petitioner's Manufacturer Thesis Is Unsupported and Unsupportable.

Petitioner nevertheless argues that his claim, though within the preempted field, is saved because he brought it against a manufacturer. That argument is unsupported and unsupportable. All three circuits to consider the question hold that LIA preempts claims within the

occupied field against locomotive manufacturers: the Second below (App. A at 7a-8a), the Ninth in *Law*, 114 F.3d at 911-12, and the Sixth in *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*). Petitioner says all three circuits are wrong, but cites no case that agrees with him. (Pet. 13-17) In fact, those uniform circuit court rulings are absolutely right for at least three reasons.

First, LIA by its terms applies to manufacturers, contrary to petitioner's claim. (Pet. 13-17) (arguing that LIA did not apply to manufacturers before railroad law was recodified in 1994, and Congress chose not to add manufacturers then). LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994. 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49 U.S.C. § 21302). The 1994 recodification act omitted that as "surplus "(*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make crystal clear that Congress intended no substantive change,[12] and the Act had previously applied

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[12] Revision of Title 49, Transportation, United States Code, Pub. L. 103-272, § 1(a), 108 Stat. 745 (1994) (recodifying statute; act restates existing law "without substantive change."), *id.* § 6(a), 108 Stat. at 1378 (recodifying provisions "may not be construed as making a substantive change in the laws replaced"); H.R. Rep. No. 108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820 ("In making changes in the language, precautions have been taken against making substantive changes in the law."). Minor changes to the language were made to promote clarity and consistency in the recodification, which placed all laws related to transportation in one comprehensive title. H.R. Rep. No. 108, *supra*, at 3, 5, *reprinted in* 1994 U.S.C.C.A.N. at 820, 822.

to manufacturers.[13] It also does now. Thus the agency's current regulations penalize any "manufacturer . . . of railroad equipment . . . who violates any requirement of . . . the Locomotive Inspection Act" – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b), § 230.0 (similar).

Second, it would make no difference if the LIA did not specifically apply to manufacturers. Field preemption is not express or limited by the precise regulations an agency adopts within the field; it extends to the whole field and is implied from a statute's purpose, structure, pervasiveness and subject and the dominance of the federal interest. *See, e.g., Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *Napier,* 272 U.S. at 612-13.

Here the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier,* 272 U.S. at 611. Manufacturers are at the center of that field; they design and construct locomotives. If states could set

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Indeed, Congress' recodification of the law without change, after the long line of decisions finding field preemption, affirms that *Napier* and progeny correctly gauged Congress' intent. *See Keene Corp. v. United States,* 508 U.S. 200, 212-13 (1993) (reenactment of statute implicitly adopts settled judicial construction); *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (same).

[13] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made "explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety," codifying the way the FRA "currently interprets rail safety laws." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. See also n.12.

standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts that complied with those state standards. Railroads would likewise have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly what LIA and *Napier* forbid.[14] *See Law*, 114 F.3d at 910-11:

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulations would be undermined.[15]

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[14] Petitioner conceded below that this locomotive "complies with federal standards," Reply Brief in Court of Appeals at 8, but argues that a jury could still find the manufacturer liable under state law. (Pet. 15-16) That is the problem.

[15] The district court's decision in *Springston* explained that:

> plaintiff ignores the effect on the regulation of railroads that the adoption of his argument would have. It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items . . . such goal would be compromised.

Springston v. Consolidated Rail Corp., 863 F. Supp. 535, 541 (N.D. Ohio 1994), *aff'd*, 130 F.3d 241, 244-45 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

In the end, petitioner proves the point. He says a manufacturer should be liable under varying state laws even for a locomotive that "complied with federal standards." (Pet. 15-16) That would make state, not federal, law the ultimate regulator; destroy uniformity; and leave locomotive design to "the varying and uncertain opinions and verdicts of juries" – the opposite of Congress' intent. Pp. 10-11, above; *Law*, 114 F.3d at 911-12:

> Imposing tort liability on railroad equipment manufacturers would . . . forc[e] them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts – a result the [LIA] was clearly intended to foreclose.

Third, field preemption turns on whether the subject of the claim is within the preempted field – not, as petitioner concedes, "on whom the legal duty is imposed." Pet. 15; *see Law*, 114 F.3d at 911-12; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is locomotive seats and design, and warnings with respect to them. That subject is squarely within the preempted field, and so preempted.

In sum, the Second Circuit held that where "the design and construction of a part are in the hands of a manufacturer, the results that Congress had hoped to obtain through the BIA would be accomplished best by including the manufacturer." (App. A at 8a) Every circuit to reach the issue agrees. *Law*, 114 F.3d at 911-12; *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*). Petitioner cites no circuit authority that disagrees. There is none.

D. Petitioner's Premise Is False.

Last, petitioner advises that "*Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) is most relevant," and notes that there this Court (a) found that the "federal manufacturing and labeling requirements at issue" reflected "generic concerns about device regulation generally," not "a specific device or field of device regulation," and (b) the "generality" of the state "requirements" at issue put them "outside the category of requirements" as to specific devices that that federal statute "envisioned." (Pet. 24-25)

Petitioner is way off the mark. *Lohr*, an express preemption case, held that the Medical Devices Act's express preemption clause did not apply to those general state requirements; there being no specific preempting federal regulation on point, those general state requirements simply could not implicate or affect one. This, however, is an occupation of the field, not express preemption, case. The state law in issue is well within the occupied field. (Pp. 12-17, above) Therefore, it is preempted regardless whether there is any on point federal regulation at all, specific or not; whether there is or not "is without legal significance." *Napier*, 217 U.S. at 613; pp. 7-8, 14, above. Or, as *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), put it: "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted," conflicting or not.

To the extent petitioner claims that *Lohr* saves common law claims in general from preemption, he is certainly wrong. A majority of Justices agreed that even in that express preemption case, where federal law would preempt "a state statute, rule, regulation, or other

administrative action," it would also preempt "a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action." 518 U.S. at 504-05 (Breyer, J., concurring); *accord* 518 U.S. at 511 (O'Connor, J., joined by Rehnquist, Scalia & Thomas, JJ., dissenting);[16] *see Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). That echoes the Court's repeated holding, *e.g.*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (emphasis added):

> Our concern is with delimiting areas of conduct which must be left free from state regulation if national policy is to be left unhampered. Such ***regulation can be as effectively exerted through an award of damages*** as through some form of preventive relief. The ***obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy***. Even the ***States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme***.

Accord International Paper Co. v. Ouellette, 479 U.S. 481, 491-500 (1987) (common-law nuisance claims preempted),

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[16] As Justice Breyer explained, "To distinguish between [state regulations and common-law tort suits] would grant greater power (to set state standards 'different from or in addition to' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes," 518 U.S. at 504, an absurd result.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so impose "requirements or prohibitions"; quoting *Garmon* with approval); *CSX Transportation, Inc., v. Easterwood*, 507 U.S. 658, 664, 675 (1993) (FRSA preempts common-law claim).

The Court of Appeals here followed that settled rule. Thus, like every other circuit court to consider the issue, and following *Napier*, it found petitioner's common law claims, since within the occupied field, preempted. *See Law*, 114 F.3d at 910-11 (common-law defect and failure to warn claim preempted); *Springston*, 130 F.3d at 244-45(LIA preempts negligence claim against railroad and manufacturer for failure to install better warning devices); *First Security*, 152 F.3d at 880-81 (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall*, 720 F.2d at 1152 (Kennedy, J.) (LIA preempted negligence claim against railroad for failure to install better warning devices), *cited in* Pet. 20.

Napier has been the law for over 70 years. Petitioner cites no case from any court that questions *Napier*'s controlling force over claims like his, and no case that would allow his claim to proceed. The circuits are unanimous that it cannot. Petitioner presents no issue to review here.

II. THERE IS NO REVIEWABLE FRSA ISSUE.

The petition interweaves arguments about FRSA with petitioner's LIA arguments. At best, those FRSA arguments sow confusion between LIA's expansive field

preemption and FRSA's narrower express preemption. But there is no FRSA issue here. The court of appeals had no occasion to address FRSA because LIA preempted petitioner's claim. Moreover, this Court has already established that FRSA's preemption clause reaches common law claims and has determined the meaning, and limits, of that clause. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664-65, 675 (1993); pp. 2-3, 24, above. Petitioner presents no FRSA issue to review here.[17]

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[17] FRSA would require affirmance if the question were reached. The Secretary has enacted numerous regulations respecting locomotive warnings, expressly directed his attention to the seat, and specifically regulated as to it. (Pp. 13-15, above) In sum, it appears the Secretary has covered the subject of locomotive warnings and seats, so "additional" state requirements as to warnings or the seat are preempted. 49 U.S.C. § 20106. FRSA excepts from preemption only state law that (1) is "necessary to eliminate or reduce an essentially local safety hazard;" (2) is not "incompatible" with federal law or regulations; *and* (3) does "not unreasonably burden interstate commerce." 49 U.S.C. § 20106. Petitioner literally could not begin to meet that test; for to begin with, seat design and warnings are not "essentially local" concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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